RHB Bank Bhd v Farlim Holding Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–402 OF 2002
KAMALANATHAN RATNAM J
18 OCTOBER 2004

Banking — Guarantee — Notice of demand issued to guarantors — Whether prior demand a condition precedent to suing guarantors — Whether such notice should state precisely amount due and owing — Effect of guarantee making guarantors principal debtors — Amount specified in notice allegedly in excess of amount due — Whether notice bad in law

Civil Procedure — Summary judgment — Application for — Claim for amount outstanding under guarantee agreements and letter of indemnity — Failure to disclose fact that property had been lodged as security — Whether triable issues raised

By way of letter of offer dated 30 January 1997 and a supplementary letter of offer dated 19 February 1997, the plaintiff had agreed upon the first defendant's request, to grant to the first defendant among others, an overdraft facility of RM10 million ('the OD facility'). The rest of the defendants stood as guarantors to the extent of the RM10 million. By a letter of offer dated 7 June 1999 between the plaintiff and the first defendant, the plaintiff agreed with the first defendant to restructure the OD facility to a term loan of RM9,647,000 ('the term loan facility'). It was a term of the agreement that the said second letter of offer superseded all previous letters of offer. The defendants failed to settle the loan amount and hence this suit by the plaintiff. The plaintiff's application for summary judgment was allowed and dissatisfied with the decision, the defendants appealed. The issues for consideration were: (a) whether the notice of demand issued against the second to sixth defendants was bad in law; and (b) whether the statement of claim is defective due to the plaintiff failure in disclosing the nature of security as provided in the second letter of offer.

Held, allowing the appeal:

(1) The defendants guarantee was only for the sum of RM10 million and the plaintiff's counsel was unable to show that the guarantee was for RM20 million upon which the notice of demand was based upon. Since the demand was pre-requisite by virtue of cl 35 of the guarantee dated 15 May 1997 and the demand was not based on the correct sum, the plaintiff's contention on this issue was totally misleading and had no substance (see para 10).

(2) The additional security item which was referred in the second letter of offer was not disclosed in the statement of claim as against the first defendant, the principal borrower and such failure by the plaintiff run against the decision in the case of *UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (FC) (followed) (see paras 12 and 13).

[**Bahasa Malaysia summary**

Menerusi surat tawaran bertarikh 30 Januari 1997 dan surat tawaran tambahan bertarikh 19 Februari 1997, plaintiff telah bersetuju atas permohonan defendan pertama, untuk menawarkan kepada defendan pertama antara lain, kemudahan overdraf untuk jumlah sebanyak RM10 juta ('kemudahan OD tersebut'). Defendan-defendan lain telah menjamin setakat jumlah RM10 juta. Menerusi surat tawaran bertarikh 7 Jun 1999 di antara plaintif dan defendan pertama, plaintif bersetuju dengan defendan pertama untuk menstruktur semula kemudahan OD tersebut kepada pinjaman jangkamasa yang berjumlah RM9,647,000 ('kemudahan pinjaman jangkamasa tersebut'). Adalah terma perjanjian bahawa surat tawaran kedua akan menggantikan kesemua surat-surat tawaran sebelum ini. Defendan-defendan telah gagal untuk menyelesaikan pinjaman tersebut dan plaintif membawa tindakan ini. Permohonan plaintif untuk penghakiman terus dibenarkan dan tidak puas hati dengan keputusan tersebut defendan-defendan telah merayu. Isu-isu untuk pertimbangan adalah: (a) sama ada notis tuntutan yang diisukan oleh plaintif terhadap defendan kedua hingga keenam adalah salah di sisi undang-undang dan (b) sama ada pernyataan tuntutan adalah defektif memandangkan kegagalan plaintif dalam mendedahkan sifat sekuriti sebagaimana yang diperuntukkan di dalam surat tawaran yang kedua.

Diputuskan, membenarkan rayuan tersebut:

(1) Jaminan defendan-defendan adalah hanya untuk jumlah sebanyak RM10 juta dan peguam plaintif gagal untuk menunjukkan bahawa jaminan tesebut adalah untuk jumlah sebanyak RM20 juta yang mana notis tuntutan adalah didasarkan. Memandangkan notis tuntutan adalah pra-syarat mengikut kl 35 jaminan bertarikh 15 Mei 1997 dan tuntutan tersebut tidak berdasarkan jumlah yang sebenar, hujahan keseluruhan plaintif ke atas isu ini adalah mengelirukan dan tidak mempunyai sebarang intipati (lihat perenggan 10).

(2) Sekuriti tambahan yang mana telah dirujuk di dalam surat tawaran kedua tidak didedahkan di dalam pernyataan tuntutan yang difailkan terhadap defendan pertama yang merupakan, peminjam utama. Kegagalan untuk berbuat sedemikian oleh plaintif adalah bertentangan sama sekali dengan keputusan kes *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC) (diikut) (lihat perenggan 12 dan 13).]

Notes

For cases on notice of demand, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3511–3523.

For cases on application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5782–5815.

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

Cases referred to

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)
UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 (folld)

Ben Chan Chong Choon (Lee Hishammuddin) for the plaintiff.
KT Rajah Naidu (VM Mohan Fareed & Co) for the defendants.

Kamalanathan Ratnam J:

[1] This is the defendants' appeal against the decision of the deputy registrar entering summary judgment against all the defendants. Having heard arguments, I allowed their appeal. The plaintiff being dissatisfied with my judgment has appealed to the Court of Appeal. These are my grounds for allowing the appeal.

FINDINGS OF THE COURT

[2] The plaintiff pleaded that by a letter of offer dated 30 January 1997 and a supplementary letter of offer dated 19 February 1997, the plaintiff had agreed upon the first defendant's request, to grant to the first defendant among others, an overdraft facility of RM10 million (the OD facility). The rest of the defendants stood as guarantors to the extent of the RM10 million. By a letter of offer dated 7 June 1999 between the plaintiff and the first defendant, the plaintiff agreed with the first defendant to restructure the OD facility to a term loan of RM9,647,000 (the said term loan facility). It was a term of the agreement that the said second letter of offer superceded all previous letters of offer.

[3] Upon breach by way of non-payment by the defendants, the plaintiff sought the following orders —

(a) a sum of RM12,312,102.29 as at 30 June 2002;

(b) further interest on the sum of RM12,312,102.29 at the rate of 3.5% per annum + 6.4% (the plaintiff's base lending rate per annum) including 1% default rate on monthly rests from 1 July 2002 until date of full realisation;

(c) a declaration that the plaintiff is entitled to sell the 2,363,000 Farlim Group (M) Bhd shares to any purchasers in any manner on any terms for such consideration at any time thought fit by the plaintiff in its absolute discretion;

(d) costs (including the plaintiff's solicitor's fees on solicitor-client basis);

[4] The plaintiff then took out a summons for summary judgment and obtained the said order. Before me Mr Rajah for the defendants raised two issues.

[5] The first letter of guarantee and indemnity dated 15 May 1997 showed that the guarantors' limit of guarantee was RM10 million (exh KKH 13). I was then referred to exh KKH 15 which was the demand notice. This demand notice addressed to all the borrowers sought the following —

Principal	RM 10,152,082.86
Interest	RM 1,552,569.39
Late Charges	RM 35,405.36
	RM 11,740,057.61

[6] Clearly the demand notice which referred to a sum of RM10,152,082.86 as the principal, when the defendants' guarantee was only for a sum of RM10 million, was bad in law. In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283, Lim Beng Choon J had this to say at p 288:

> I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid. It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.
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> In the circumstances of this case I am satisfied that the plaintiff bank are not prima facie entitled to the remedies sought by them in their originating summons. The matter must go for trial. Costs of this proceeding are to be paid by the plaintiff bank to the defendant company.

[7] In reply, Mr Ben Chan for the bank surprised not only the counsel for the appellants but this court too by maintaining that there were two guarantees for RM10 million each and that therefore the principal sum claimed being RM10,152,082.86 was well within the RM20 million guarantee.

[8] To my mind this is a preposterous submission. The exh KKH 13 itself referred to only RM10 million. Mr Chan refused to answer this court's pointed question whether his contention that there were two guarantees of 10 million each was reflected in his firm's notice of demand to the guarantors. Instead of answering a simple question, Mr Chan referred me to the case of *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 and to a passage from Shankar J (as he then was) in respect of the requirement or otherwise to state the precise amount owing correctly in the notice. Mr Chan quoted His Lordship at p 308 which reads as follows —

> I agree that great care should be taken when applying *Mok Hin Wah's* case (*Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610) to remember that it will only apply if the words of the guarantee specifically make a prior demand a condition precedent to suing the guarantor. There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice

must be given in all cases. The writ itself is a notice: see *Malayan Banking Bhd v Lim Chee Leng* [1985] 1 MLJ 214. Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated.

[9] Mr Chan has obviously chosen not to point out to the court that Shankar J was referring to cases where a notice of demand was not a pre-requisite. It is otherwise in the case before me. Clause 35 of the guarantee dated 15 May 1997 reads as follows —

35 Notwithstanding anything to the contrary herein this guarantee contained, no cause of action shall arise for the enforcement of this guarantee until a demand has been made by the bank on the guarantor and therefore the time provided for in law for recovery of every month, liability and/or obligation under this guarantee shall not run until a demand has been made by the bank on the guarantor.

[10] Clearly a demand was a pre-requisite and the demand is not for the correct sum since Mr Chan was unable to show that the guarantee was for RM20 million. In any case as stated by me earlier even on his own pleadings counsel had pleaded that the second letter of offer had superceded all previous letters of offer. The first guarantee dated 15 May 1997 was in respect of the first letter of offer. The second guarantee was in reply of the second letter of offer which superceded the earlier letters of offer. There is therefore only one guarantee for RM10 million. Mr Ben Chan's submission on this issue was therefore totally misleading and had no substance. Therefore the summary judgment obtained against the second to sixth defendants was wrong both in law and in fact.

[11] The next issue raised by Mr Rajah was in respect of the summary judgment obtained against the first defendant, the principal borrower. Counsel pointed out that the plaintiff had not disclosed in the statement of claim the nature of the security as provided in the second letter of offer. The restructured OD facility as contained in the fresh letter of offer dated 7 June 1999 showed the need for the first defendant to provide three further securities as —

(a) Against the existing pledge of 2,570,000 units of Farlim Group (M) Bhd shares capped at RM7 per share with an advance margin of 60% based on the market value.

(b) Against the existing joint and several guarantee of Dato' Lim Gait Tong, Datin Chin Chew Lin, Dato' Hj Mohd Iqbal b Kuppa Pitchai Rawther and Lim Yat Koi @ Lim Yoke Kwai of RM10,000,000.

(c) Against a new third party first legal charge for RM1,000,000 over a piece of leasehold development land in Subang New Village, PT 3897 held under HS(M) 1737, Mukim Sungai Buloh, Selangor.

[12] If indeed there was to be a guarantee requirement of RM20 million as contended by Mr Chan, surely such a view ought to have been expressly spelt out in this restructured letter of offer so that the first defendant would have

A been put on notice that the guarantee required was for RM20 million and not for RM10 million. In any case the additional security item (c) was not disclosed in the statement of claim as against the principal borrower.

[13] On this issue it is relevant to refer to the Federal Court's decision in *UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 and to the B words of Raja Azlan Shah Ag LP at p 207. They read as follows —

> As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September, 1980, and these matters were only disclosed for the first time in June, C 1981 in the affidavit in support of the O 14 summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1892] 2 QB 14 where Mathew J, said that 'it is most important that a defendant should know from the writ what the exact claim against him is'. The D respondents also complain of the timing of the sale and the price realised and we would on this aspect refer to *Cuckmere Brick Co Ltd & Anor. v Mutual Finance Ltd* [1971] Ch 949; [1971] 2 All ER 633 (which was applied in *Duke v Robson* [1973] 1 All ER 481) that the duty of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in E *Standard Chartered Bank v Walker & Anor* [1982] 3 All ER 938. We would add that even after the sale of the shares there was and has been no attempt to amend the statement of claim to reflect the true position.

[14] Mr Chan had no answer to this. He merely submitted that the two guarantees signed whilst not disclosed in the statement of claim were disclosed F in the notice of demand and the notice of demand was referred to in the statement of claim. To my mind such an answer falls short of the requirement to disclose in the statement of claim as enumerated by the highest court in this country.

[15] I had no alternative but to allow the appeal of all the defendants and G to set aside the summary judgment entered agains them.The matter must go for trial. Since I had omitted to award the successful appellants the costs and since no order has been extracted to date, I will award the appellants the costs both before me and before the deputy registrar.

H *Appeal allowed.*

Reported by Sugandra Rao

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